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OFFICE OF PETITIONS

In re Application of
SCOTT EVANS
Application No. 09/267,840
Filed: 03-12-1999
Attorney Docket No. EVA-001

DECISION ON PETITION

This is a decision on the petition under 37 CFR 1.181, filed June 5, 2007, to withdraw the holding of abandonment.

On June 29, 2006, the Office mailed a final Office action, which set a three-month shortened statutory period to reply. In the apparent absence of a timely reply, the Office mailed a Notice of Abandonment on January 12, 2007.

In the present petition, applicant requested that the Office withdraw the holding of abandonment as stated in the Notice of Abandonment mailed January 12, 2007. Applicant averred that the Office issued the Notice of Abandonment in error because applicant filed a timely and proper reply to the final Office action of January 3, 2007 (certificate of mailing December 29, 2006). Applicant asserted that he filed a Notice of Appeal and a request for an extension of time for response within the third month, accompanied by a certificate of mailing dated December 29, 2006. In support of the assertion, applicant provided a copy of the return, date-stamped postcard acknowledging receipt of a Transmittal; Notice of Appeal; a Request for Reconsideration; a Petition for Extension of Time; and a check in the amount of \$760.00 fee in the USPTO on January 3, 2007. Copies of these documents accompanied the petition.

Upon a review of the record, applicant has established that he submitted a timely reply to the final Office action in the form of a Notice of Appeal and a three-month extension of time on January 3, 2007 (certificate of mailing December 29, 2006). Therefore, the two-month extendable period to file an appeal brief in compliance with 37 CFR 41.37, accompanied by the fee, began to run from January 3, 2007, the date of filing the notice of appeal. The Office notes that "37 CFR 41.37(a) does not permit the brief to be filed within the time allowed for reply to the action from which the appeal was taken even if such time is later." *MPEP 1205*. "Once appellant timely files a notice of appeal in compliance

with 37 CFR 41.31, the time period for reply set forth in the last Office action is tolled and is no longer relevant for the time period for filing an appeal brief.” *Id.* Therefore, applicant was required to submit an appeal brief on or before March 3, 2007 (or June 3, 2007, accompanied by a request for an extension of time for response within the fifth month and fee). In other words, applicant, himself, started the running of the two-month extendable period to file an appeal brief based upon the date applicant submitted the Notice of Appeal with the USPTO. Unfortunately, the record reveals that applicant has not filed an appeal brief to date.

As no timely appeal brief was received in the USPTO, the application was properly held abandoned. Accordingly, the petition is **dismissed**. The application will remain in its abandoned state until applicant files a petition to revive the application, accompanied by an appropriate reply and the petition fee.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
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By FAX: (571) 273-8300
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Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3211.



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